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PROGRAMME MATTERS

Mid-term review of the Programme for the Development and Periodic Review of Environmental Law for the 1990s and further development of international environmental law aiming at sustainable development

Preliminary study on the need for and feasibility of new international environmental instruments aiming at sustainable development

Note by the Executive Director

1. The Executive Director has the honour to present herewith for the information of the Governing Council the preliminary study on the need for and feasibility of new international environmental instruments aiming at sustainable development prepared pursuant to the request of the Governing Council in its decision 18/9, paragraph 5. The study received only limited consideration by an Expert Group Workshop on International Environmental Law Aiming at Sustainable Development, which was convened by UNEP and met in Washington, D.C. in November 1995 and in May and September/October 1996. It has been found that the study requires further elaboration.

2. The text of the study is reproduced as it appears in annex II of the final report of the Expert Group Workshop (UNEP/IEL/WS/3/2), which has already been circulated to all Governments in English, French and Spanish, the three working languages of the Workshop.

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Annex

PRELIMINARY DRAFT STUDY ON THE NEED FOR AND FEASIBILITY OF NEW INTERNATIONAL ENVIRONMENTAL INSTRUMENTS AIMING AT SUSTAINABLE DEVELOPMENT

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EXECUTIVE SUMMARY

The present study responds to the request in paragraph 5 of UNEP Governing Council Decision 18/9 of 26 May 1995 for the Executive Director to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development.

The study identifies principal challenges in the field of environmental protection and sustainable development and attempts to ascertain the need for and feasibility of new instruments to address those challenges. After noting the efforts that are currently underway to address some of the challenges that have been identified, the study recommends that UNEP take action in the following areas:

1. Prevention of marine pollution from land-based activities;

2. Protection, allocation and management of shared fresh water resources;

3. Regulation of hazardous substances and chemicals;

4. Climate change;

5. Interaction of international environmental law with other branches of international law;

6. Enhancing public participation in environmental decision-making processes and cooperation at the local level on transboundary problems;

7. Cooperation at the local level;

8. Forest loss and management;

9. Further development of concepts and principles in the field of international environmental law and sustainable development.

Some of the foregoing items are included in the list in light of their importance, even though new instruments are not recommended at this stage.

1. Introduction

In the context of the mid-term review of the Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II), the Governing Council, at its eighteenth session adopted decision 18/9 on 26 May 1995. In paragraph 5 of that decision, the Governing Council:

> "Requests the Executive Director, within available resources to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development, addressing, on a priority basis, the principal environmental challenges, including as they relate to the broader issues of sustainable development as set forth in Agenda 21, and, in fulfilling this task, to draw upon relevant work and activities of other United Nations agencies and international organisations."

The present study responds to this request of the Governing Council. 1/ In so doing, it seeks to contribute to the fulfilment of the mandate of Montevideo Programme II, in particular its programme area H, "Concepts or principles significant for the future of international environmental law". 2/ The study identifies the principal environmental challenges that may require international action on a priority basis, and examines the need for and feasibility of new instruments (section 2). On the basis of this analysis, the study makes recommendations for future action (section 3).

2. The Need for and Feasibility of New Instruments

(a) Introduction

This section examines the need for and feasibility of new international environmental instruments in the field of sustainable development. Concerns are sometimes expressed in relation to the number of international environmental instruments that already exist and problems of implementation and compliance with regard to those instruments. The present study recognizes the existence of those concerns and attempts to take them into account through specific criteria for determining need and feasibility,

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1/ The study draws, *inter alia*, upon: relevant decisions of the UNEP Governing Council; the 1992 Rio Declaration on Environment and Development, particularly Principle 27; Agenda 21, particularly Chapters 8, 38 and 39; the Montevideo Programme, including the Review of Montevideo Programme of 1 August 1991 and the Montevideo Programme II of 21 May 1993; relevant UNEP reports; relevant decisions and reports of the United Nations Commission on Sustainable Development; the discussions at the Expert Group Workshops on International Environmental Law Aiming at Sustainable Development, convened by UNEP in 1995-1996; global, regional and sub-regional conventions related to international environmental law and sustainable development; relevant soft law instruments; additional relevant work and activities of other United Nations agencies and international organizations; and recent literature.

2/ In particular, this study responds to the "activities" listed under that programme area.

identified below. After listing those criteria, this section undertakes to identify the principal environmental challenges and the types of instruments that may be appropriate to deal with them.

(b) Criteria for Determining the Need for and Feasibility of New Instruments

There is a broad range of factors that bear upon the *need* for new international environmental instruments aiming at sustainable development and the *feasibility* of those instruments. The criteria relating to these two issues may overlap somewhat, but in large measure they are separate. Even so, the feasibility of new instruments is, to a certain extent, a function of their need. That is, the existence of a high degree of need for a new instrument with regard to a particular challenge would generally mean that a number of the important criteria for feasibility would be met. Conversely, a low degree of need with regard to a particular problem would generally mean that a new instrument for that problem would not be highly feasible. This interrelationship between the questions of need and feasibility, and thus of the criteria for determining them, should be borne in mind in considering the following lists.

(i) Criteria for determining need

Criteria for determining the *need* for new international environmental instruments aiming at sustainable development include, but are not limited to, the following:

(1) whether there is a sound scientific basis for the elaboration of legal principles or rules concerning the challenge in question;

(2) the urgency of the challenge, including the nature and seriousness of threats to the natural environment, human health and development;

(3) the extent to which the challenge requires legal responses of a binding nature;

(4) the appropriateness of dealing with the challenge on the international, as opposed to the national level;

(5) whether a particular new regime would:

(a) promote integration of environment and development;

(b) be compatible with the existing system of international environmental instruments;

(c) add value to the existing system by filling well recognized gaps;

(d) enhance the coherence of international environmental law aiming at sustainable development; and

(e) have a positive impact upon issues beyond those directly related to the environment (e.g., international peace and security, human rights, public participation, indigenous peoples);

(6) the need for achieving greater clarification and uniformity through codification or systematization of existing principles; and

(7) the extent to which the challenge is dealt with effectively by existing instruments. This criterion includes such considerations as ratification records, the degree of compliance with the instrument, and its comprehensiveness and level of detail.

(ii) Criteria for determining feasibility

Criteria for determining the *feasibility* of new international environmental instruments aiming at sustainable development include, but are not limited to, the following:

(1) the extent to which there exists a social consensus 3/ with regard to the challenge and the way in which it should be addressed (if there is national legislation on point, this may be reflected in the degree of acceptance of a given regime or principle in that legislation, including how widespread that acceptance is 4/);

(2) the prevailing public policy of governments;

(3) whether there has been an express statement by the international community on the need for a new instrument or further development of an existing regime; 5/

3/ The idea of social consensus includes the positions on the question of individual members of the public, industry and non-governmental organizations.

4/ Examples of subjects that are increasingly being dealt with in national legislation include environmental impact assessment and the removal of lead from gasoline.

5/ For example the provisions in the Stockholm (Principle 22) and Rio (Principle 13) Declarations calling for developing the law of liability and compensation for environmental damage; those of Agenda 21 and the Montevideo II on principles of international environmental law; those of Agenda 21 on binding instruments on prior informed consent (chapter 19) and on the legal regime of protection of the marine environment from the harmful effects of land-based activities (chapter 17); that of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on a Liability

(4) whether soft law on the subject already exists and is voluntarily applied, and the practice of its application suggests that a corresponding binding instrument would be advisable; 6/

(5) the extent to which financial resources would be necessary and available for the implementation of the instrument;

(6) whether an initial dialogue among Governments has already taken place; 7/

(7) whether there is an existing forum or legal framework for consultations and negotiations; 8/

(8) whether there is an existing understanding of the form a particular instrument might take, or of options for that form; 9/

(9) whether the appropriate geographical level (global, regional, sub-regional) of legal regulation has been identified; 10/

(10) the availability of sufficient capacity, including infrastructure and appropriately trained personnel, to address the challenge; and

(11) the extent to which already existing instruments are being implemented, and whether the addition of new obligations may be unduly burdensome on states.

Protocol; and that of the Convention on Biological Diversity on a Biosafety Protocol.

6/ For example, the possibility of transforming the amended London Guidelines for the Exchange of Information on Chemicals in International Trade into a convention on prior informed consent.

7/ For example, such as has been the case as to some issues during UNCED, CSD meetings, and UNEP Governing Council sessions.

8/ For example, the Conference of the Parties of the United Nations Framework Convention on Climate Change with regard to a possible Protocol or Intergovernmental Panel on Forests.

9/ For example, a Protocol under the United Nations Framework Convention on Climate Change; a binding instrument on forests.

10/ For example, the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, to be supported by regional agreements; the Bonn Convention on Migratory Species of Wild Animals to be developed through agreements between range States.

(c) Principal environmental challenges and types of instruments that may be appropriate to deal with them

This section first attempts to identify the principal environmental challenges facing the international community. It then considers the types of new instruments that may be appropriate to deal with those challenges.

There are several different categories of challenges, or problems, as to which there may be a need for new instruments in the field of environmental protection and sustainable development. Two will be focused upon here. The first category includes sectoral issues, that is to say, specific environmental problems such as air or water pollution. The second category has to do not with problems of the natural environment per se, but with the ways in which states address those problems. It includes the overarching principles and cooperative procedures applicable to environmental problems generally. In the light of these categories, this section takes into consideration not only challenges concerning specific sectors of the environment, but also those of a more general nature and those that may require new instruments containing principles and procedures applicable to environmental problems generally. While challenges are considered separately, it should be borne in mind that they are in fact interrelated to a large extent.

Initially, principal environmental challenges are identified without regard to whether they are currently being addressed in relevant fora. The rationale for this approach is the following: The fact that a particular challenge is being so addressed does not mean that the forum will succeed in producing an instrument, that any instrument produced will address the challenge adequately, or that the form of instrument that is adopted is the optimal one. Ongoing work on a given challenge will be taken into account in section 3 of the present study, in which specific action is recommended.

In order to keep the study within a practical scope, the time frame employed in identifying principal challenges in the field of the environment is the next phase of the Montevideo Programme II.

The criteria employed for identifying principal challenges in the field of environmental protection and sustainable development include the following: how well identified the problem or challenge is; the degree of scientific consensus concerning the challenge; the availability of solutions; whether the phenomenon in question is of an irreversible nature, and the time frame available within which the challenge may be effectively addressed; the impact of the challenge upon vulnerable populations; the impact of the challenge on security concerns; and whether a challenge or problem in fact exists in a given area, rather than whether or not that area is already the subject of some form of international instrument (for example, in some instances existing regimes may need to be strengthened, while in other areas no regime may presently exist).

Turning to the types of instruments that may be appropriate, the expression "new" instruments includes, for the purpose of this section, not only those that deal with a particular challenge for the first time, but also

those that improve upon regimes that are existing but inadequate, or that codify existing principles or rules, as well as those that address new issues.

The type of instrument that may be appropriate for a given problem will depend upon a number of factors, including the geographical scope of the problem, the presence or absence of existing instruments, the feasibility of addressing the problem on the global, regional, sub-regional or national level, and any other factors that may be relevant in the particular case.

The kinds of instruments that are available fall essentially into two categories: those characterized by the level at which they are adopted, i.e., the global, regional, sub-regional or national level; and those characterized by whether they are of a binding nature or not, e.g., treaties (binding "hard" law) versus guidelines (non-binding "soft" law). 11/ Thus each individual challenge or problem may be addressed in instruments on the global, regional/sub-regional or national level, and instruments on each level may be either of a hard-law or a soft-law nature.

As already indicated, the appropriateness of each kind of instrument to deal with a particular problem must be assessed according to all relevant factors. In some cases a combination of these kinds of instruments may be appropriate, such as a global framework of principles which is implemented through binding agreements on regional and possibly other levels. Even within a particular type of instrument there are different possibilities. For example, a global convention may contain a framework of principles, 12/ a more detailed regulatory regime, 13/ or may even contain provisions of both kinds. 14/ Similarly, soft law instruments may be of a more 15/ or less 16/ detailed nature.

11/ It is recognized that an instrument adopted in soft-law form, such as a United Nations General Assembly declaration, may in fact constitute a codification, or restatement, of existing principles of general international law. The emphasis in this study is upon the form of the instrument rather than whether a particular soft-law instrument may have some binding legal effect.

12/ For example, the Vienna Convention on the Protection of the Ozone Layer of 22 March 1985.

13/ For example, the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

14/ For example, the United Nations Convention on the Law of the Sea of 10 December 1982. This is also true of a number of environmental agreements that contain provisions of a general nature in the agreement itself and detailed provisions in annexes.

15/ For example, the "Friendly Relations Declaration," Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, United Nations General Assembly resolution 2625 (XXV) of 24 October 1970.

16/ For example, the "Outer Space Declaration," Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, United Nations General Assembly resolution 1962 (XVIII) of 13 December 1963.

Furthermore, there is a range of possible mechanisms for implementing the instruments in question. These include the establishment of lists of substances or activities to be regulated that may be easily and quickly updated; decisions of committees or other bodies; the use of annexes, protocols of provisional application, and similar techniques; action plans; financial mechanisms; mechanisms facilitating the transfer of technology; and mechanisms contributing to capacity-building.

Below are listed what are considered, on the basis of the criteria identified above, to be the principal challenges in the field of environmental protection and sustainable development on the international level, together with the type of instrument that may be appropriate to deal with each challenge. A brief explanation of the reasons for including each item is offered. Other challenges that are significant but are not considered to rise to the level of importance of the principal challenges are listed in Annex B. Types of instruments are identified without regard to any ongoing work with regard to a particular challenge, in order to provide a yardstick against which to measure whether that work is appropriate to deal with the challenge, according to the criteria set out above. The items are not listed in order of priority.

(1) Protection, allocation and management of shared fresh water resources

The United Nations has long recognized the importance of the conservation and harmonious utilization of internationally shared freshwater resources. Among the many meetings under held United Nations auspices at which this subject has been addressed are the United Nations Water Conference (Mar del Plata, 14-25 March 1977), the United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region (Addis Ababa, 10-15 October 1988), and the International Conference on Water and the Environment (Dublin, 26-31 January 1992). Fresh water is the subject of an entire chapter of Agenda 21: Chapter 18, Protection of the quality and supply of freshwater resources: application of integrated approaches to the development, management and use of water resources. Programme area N of the Montevideo Programme II is entitled "Environmental protection and integrated management, development and use of inland water resources." One of the strategies contained in that programme area is to:

> "(a) Encourage the development of cooperative mechanisms between States including, as appropriate, international legal instruments for the protection and integrated management, development and use of transboundary water resources with a view to the prevention, reduction, control and reversal of their degradation and for the prevention and peaceful resolution of disputes between States".

In 1970 the United Nations General Assembly recommended that the International Law Commission (ILC, or Commission) "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification." 17/ The Commission later began work on the project, which was completed in 1994. In October 1996 the

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17/ United Nations General Assembly resolution 2669 (XXV) of 8 December 1970, paragraph 1.

General Assembly will convene a Working Group of the Whole to elaborate a framework convention on the basis of the draft articles adopted by the ILC. The growing scarcity of fresh water per capita is well known, as is the potential for international conflict over shared freshwater resources.

A global, framework convention with specific agreements for regions or shared drainage basins is recommended for the second challenge because of the dual needs in this field: first, to establish an agreed set of general principles and rules governing all international watercourses; and second, to apply and adjust those principles and rules to the unique conditions of each international watercourse and the needs of the states concerned. The reasons for the second need would not appear to require further elaboration. With regard to the first need, there are several reasons why an agreed set of general principles and rules should be established, including: to provide a model for states sharing international fresh water resources, indicating the factors that should be taken into consideration in their relations concerning those resources; to establish a basic set of norms, negotiated on the global level, for the guidance of states in the absence of a specific applicable agreement; and to anticipate and provide a legal framework for dealing with the growing problems that are likely to arise between states with regard to international watercourses.

(2) Climate change

Climate Change is addressed in Chapter 9 of Agenda 21, Protection of the Atmosphere. The Berlin Mandate, adopted at the First Session of the Conference of Parties to the United Nations Framework Convention on Climate Change in Berlin, March 1995, calls for the elaboration of a protocol to the Convention. The protocol would strengthen international efforts to deal with this all-important problem by establishing specific reduction targets and providing for financial assistance and transfer of technology to developing countries.

The problem of climate change is of such magnitude that UNEP should continue monitor efforts to deal with it and help to ensure that the process continues forward in an expeditious and scientifically sound manner.

(3) Transboundary air pollution

Chapter 9 of Agenda 21 is devoted to Protection of the Atmosphere. The fourth programme area addressed in that chapter is Transboundary atmospheric pollution. In that connection, Chapter 9 states that the programmes established under the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, and its protocols, "need to be continued and enhanced, and their experience needs to be shared with other regions of the world." Programme area J of the Montevideo Programme II is entitled "Transboundary air pollution control". One of the strategies under that programme area is to:

> "(a) Consider the possible development of international legal instruments and mechanisms at appropriate levels for the prevention, control and reduction to acceptable levels of emissions causing transboundary air pollution and their effects".

The 1979 Convention covers the ECE region. There is a need in some, but not all other regions for agreements on the subject.

Regional agreements would be most appropriate with regard to this challenge. A global instrument would not seem necessary in view of the fact that a model already exists in the form of the 1979 ECE Convention. As mentioned above, Agenda 21 calls for the sharing of the experience with the 1979 Geneva Convention, and the Montevideo Programme II also identifies this as an important need.

(4) Cooperation at the local level on transboundary problems

Transboundary problems such as air and water pollution, waste water treatment, and the provision of safe drinking water are often best dealt with at the local level, between the concerned authorities on either side of the boundary. This approach is not only the most direct and often the most efficient, but it also helps to prevent essentially local or regional challenges from escalating into disputes between states on the international level. While no instrument is recommended with respect to this challenge, it is believed that UNEP could perform an important function in assisting states in the development of cooperative relationships between and among regional and local authorities of neighbouring countries, and, where appropriate, in the conclusion of regional agreements on the subject.

(5) Marine pollution from land-based activities

It is noted in Chapter 17 of Agenda 21 that "[l]and-based sources contribute 70 per cent of marine pollution . . . . Many of the polluting substances originating from land-based sources are of particular concern to the marine environment since they exhibit at the same time toxicity, persistence and bioaccumulation in the food chain. There is currently no global scheme to address marine pollution from land-based sources." That chapter recommends that states "[c]onsider updating, strengthening and extending the Montreal Guidelines [for the Protection of the Marine Environment from Land-Based Sources], as appropriate", and that they "[i]nitiate and promote the development of new regional agreements, where appropriate".

On November 3, 1995, a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was adopted by an Intergovernmental Conference that met for that purpose under UNEP auspices in Washington, D.C. The Conference also adopted the Washington Declaration on Protection of the Marine Environment from Land-Based Activities. Programme area O of the Montevideo Programme II is entitled "Marine pollution from land-based sources". The strategy under that programme area is, in part, to: "Cooperate in the development of regional treaties, protocols or other instruments regarding the degradation of the marine environment from land-based activities, where necessary . . . ." Finally, Article 207 of the 1982 United Nations Convention on the Law of the Sea is entitled "Pollution from land-based sources". Paragraph 4 of that article provides in part:

"States, acting especially through competent international organizations or diplomatic conference[s], shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources .... "

This provision of the 1982 Convention, which now has some 105 parties, constitutes an especially significant recognition of the need for concerted action with regard to this pressing issue.

A global action plan with binding regional agreements is recommended for this challenge because there is a need for both global goals and guidelines and binding regional agreements that tailor the global standards to suit specific regions. 18/ This is also the approach called for by Agenda 21, and is supported by Article 207 of the 1982 United Nations Convention on the Law of the Sea. A number of protocols have already been concluded under the Regional Seas Programmes. 19/ A global soft-law instrument is perhaps preferable to a binding convention for several reasons, including the greater feasibility of achieving the former, the difficulty of achieving agreement on binding global principles that apply to all regional seas, and the inherent advantages of an action plan, including its flexibility, its use as a goal-setting device, and the likelihood that it could command wider acceptance than a binding instrument.

(6) Protection of soils

The importance of protecting soils against degradation is reflected in action that has been taken to that end by a number of international organizations. In 1972 the Council of Europe recognized the importance of the problem by adopting the European Soil Charter. This was followed by a set of principles entitled the World Soil Charter, adopted in 1981 by FAO. Agenda 21 deals with soils in Chapter 12 entitled "Managing fragile ecosystems: Combating desertification and drought". Programme area B of that chapter is entitled "Combating land degradation through, inter alia, intensified soil conservation, afforestation and reforestation activities". It notes that desertification affects nearly one quarter of the global land area. Other forms of soil degradation, such as waterlogging and salinization, affect additional areas of land. Programme area K of the Montevideo Programme II is entitled "Conservation, management and sustainable development of soils and forests". One of the activities under this programme area is to:

18/ The fact that a Global Programme of Action has been adopted in this field is recognized in section 3 (c)(iii) below.

19/ These include: the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-based Sources (Athens, 1980); the Protocol for the Protection of the Marine Environment Against Pollution from Land-based Sources (Kuwait, 1990); the Protocol for the Protection of the South-east Pacific Against Pollution from Land-based Sources (Quito, 1983); and the Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources (Bucharest, 1992). A draft protocol on the protection of the marine environment from land-based activities is currently being developed under the Wider Caribbean Action Plan.

"(a) Promote effective implementation of the Plan of Action for the realization of the goals and objectives of the World Soil Charter, including the preparation of guidelines for domestic legislation and related institutional mechanisms".

These instruments demonstrate clearly a broad recognition of the problem and of the need to increase efforts to deal effectively with it.

Global guidelines or a global declaration is recommended for this challenge because of the increasing importance of the problem on the global level. A binding instrument has not been recommended because, despite the importance of the problem, it may not be sufficiently understood on the political and social levels, either internationally or nationally, to merit such an approach. The recommendation would help to implement Programme area K of the Montevideo Programme II, mentioned above.

(7) Forest loss and management

Chapter 11 of Agenda 21 is entitled "Combating Deforestation". It recognizes that: "There are major weaknesses in the policies, methods and mechanisms adopted to support and develop the multiple ecological, economic, social and cultural roles of trees, forests and forest lands." 20/ There is widespread agreement on the need to strengthen efforts to deal with forest loss around the world. The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests 21/ (Statement of Forest Principles) adopted at the Earth Summit were a first step, but must be followed by agreements on the regional level on the protection and management of forests.

(8) Regulation of hazardous substances and chemicals

International efforts to deal with the effects of hazardous substances and chemicals on human health and the environment have been stepped up as understanding of these effects has increased. In general, the growing chemical load on the environment is of concern. With regard to persistent organic pollutants (POPs), for example, work is underway, or has recently been concluded, by the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), the International Programme on Chemical Safety (IPCS) and the Intergovernmental Forum on Chemical Safety (IFCS). The IFCS Ad Hoc Working Group on POPs adopted its final report at its meeting in Manila, Philippines in June, 1996, 22/ stating, *inter alia*, that international action, including a global, legally binding instrument, is required to reduce the risk to human health and the environment from releases of the twelve specified POPs. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal applies only to hazardous wastes. Efforts are currently underway to put into binding form the amended London Guidelines on prior informed consent (PIC) with regard to chemicals in

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20/ Agenda 21, paragraph 11.1.

21/ A/CONF.151/26/Rev.1(Vol.I), Annex III.

22/ IFCS/WG.POPs/Report.1.

international trade. Provisions on export of domestically prohibited products could be included. There is a serious regulatory gap in this area with regard to radioactive wastes. Finally, there is emerging recognition of the threat to human and animal reproduction from endocrine disruptors. 23/

There appears to be a widespread recognition of a global, legally binding instrument on POPs. Regional instruments on this subject could also be appropriate in some cases. A global, legally binding agreement on prior informed consent (PIC) is also needed in this area.

(9) Interaction of International Environmental Law with other branches of International Law

One of the bases for action under Chapter 39 of Agenda 21 is:

> "(b) The need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries"."

These efforts should address such matters as the compatibility and complementarity between multilateral environmental agreements 24/ and World Trade Organization (WTO) law; the resolution of disputes at the interface of trade and environment; ensuring that patents and other intellectual property rights, regulated by the TRIPS agreement under the WTO, are supportive of both the objectives of the Convention on Biological Diversity, as called for by article 16(5) of that convention, and technology transfer; and the relationship of international environmental law with international humanitarian and human rights law (e.g., Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, arts. 35 and 55; also arts. 54 and 56 of that Protocol), as well as with the rules of international law governing mass movements of populations due to armed conflict. There is also a need for increased coordination of the efforts of different international bodies to deal with the interaction between international environmental law and other branches of international law.

It is recommended with regard to this challenge that UNEP focus in particular on the relationship between multilateral environmental agreements and WTO law. The fact that work is being done on this subject in the context of the WTO does not necessarily mean that there is no need for additional, or separate action. The work of the WTO in this area is being done from a trade perspective, as is appropriate for that organization. The problem should also be addressed from a perspective of environmental protection and sustainable development. UNEP is in fact already in the process of examining the trade impacts of multilateral environmental agreements. There is no

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23/ See generally Theo Colborn, Dianne Dumanoski & John P. Myers, Our Stolen Future (1996).

24/ Including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol and the Basel Convention.

reason to believe that the two efforts could not be complementary and mutually supportive, especially since the work in the context of the WTO has not yet come to fruition. 25/

(10) Public participation in environmental decision-making processes

Principle 10 of the Rio Declaration states that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level." There is a clear need to improve the access of individuals at the national level to information concerning the environment held by public authorities, and to enhance the opportunity of individuals to participate in environmental decision-making processes.

The elaboration of internationally applicable principles relating to public participation in environmental decision-making processes is recommended for this challenge. Such an instrument could develop the principles contained in Principle 10 of the Rio Declaration. It could benefit from the experience of the OECD and ECE, and could provide a model for the negotiation of similar agreements in other regions.

(11) Coordination of institutional mechanisms in the field of the environment and sustainable development

The proliferation of secretariats in the field of the environment and sustainable development is a well-known phenomenon. Many new conventions are managed by their own secretariats, creating the possibility of overlapping competencies and duplication of effort. Calls have consequently been made for, *inter alia*, the coordination of the work of these bodies, in order to enhance the effectiveness of the efforts of states in the field of the environment and sustainable development.

These appeals should be supported. While the approach of consolidating secretariats may prove to be too politically controversial to be feasible, improved coordination of their activities would produce clear benefits and should not arouse significant controversy.

(12) Achievement of a common understanding and interpretation of concepts and principles in the field of international environmental law

Chapter 39 of agenda 21 is entitled International legal instruments and mechanisms. The first basis for action in Chapter 39 is:

25/ At the second session of the Commission on Sustainable Development, it was noted that close cooperation between GATT/WTO and UNEP was important, "in particular, when considering the relationship between the provisions and dispute settlement mechanisms of the multilateral trading system and those of multilateral environment agreements, including with respect to the question of compliance with trade provisions in multilateral environmental agreements negotiated under the auspices of the United Nations". These comments were reiterated at the Commission on Sustainable Development at its fourth session.

"(a) The further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns".

Programme area A of that chapter states that the "priorities for future law making on sustainable development . . . may include an examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development, as provided by General Assembly resolution 44/228." One of the programme areas contained in the Montevideo Programme II is programme area H entitled "Concepts or principles significant for the future of international environmental law". The objective of that programme area is to "[f]urther develop, as appropriate, international environmental law."

Much progress has been achieved in the development and elaboration of concepts and principles on environment and sustainable development in recent major conventions, 26/ as well as in soft-law instruments, notably the Stockholm (1972) and Rio (1992) Declarations. 27/ While some of the principles contained in those instruments are undoubtedly of a legally binding nature, 28/ the status of others is uncertain. A common understanding and interpretation of concepts and principles in the field of the environment and sustainable development would promote environmental protection and sustainable development, and would assist states in their negotiation of new instruments. It is therefore recommended that work on the identification and further development of general concepts and principles in the field of environmental protection and sustainable development be continued, whether in meetings dedicated to this end or in the context of work on sectoral issues or on problems in the field. Governments should be assisted in the achievement of a common understanding and interpretation of concepts and principles in this field.

(d) Challenges that are being or have recently been addressed in various international fora

The following challenges identified above are currently being, or have recently been addressed in the international fora indicated.

26/ See, for example, the principles set forth in the United Nations Framework Convention on Climate Change, Article 3; and the Convention on Biological Diversity, Article 3.

27/ See also the Draft International Covenant on Environment and Development prepared by the IUCN Commission on Environmental Law in cooperation with the International Council of Environmental Law, IUCN *Environmental Policy and Law Paper No. 31* (World Conservation Union, 1995).

28/ This is in particular true of the principle that states shall not cause significant transboundary environmental harm, contained in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The legal status of this principle has been confirmed most recently by the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996 (paragraph 29).

(i) Protection, allocation and management of shared fresh water resources

In 1994, the United Nations International Law Commission (ILC) adopted on second reading a set of articles on the Law of the Non-Navigational Uses of International Watercourses. On the recommendation of the ILC, the United Nations General Assembly, in Resolution 49/52, decided to "convene a Working Group of the Whole . . . to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission." 29/ This meeting will be held for three weeks in October, 1996. Work is also being done to develop regional agreements, including, for example, the sub-regional project on Lake Victoria under the UNEP/UNDP Joint Project on Environmental Law in Africa.

(ii) Marine pollution from land-based activities

The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was adopted on November 3, 1995, at the High-level Segment of the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities. 30/ Also adopted at that meeting was the Washington Declaration on Protection of the Marine Environment from Land-Based Activities. 31/ In addition, there are ongoing efforts to develop an instrument on persistent organic pollutants (POPs). 32/

(iii) International trade in hazardous substances

Negotiations are currently underway on the subject of prior informed consent (PIC) in the field of chemicals. The negotiations are aimed at arriving at a binding instrument on the basis of the amended London Guidelines.

(iv) Compatibility of multilateral environmental agreements with WTO law

The subject of the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements, has been under consideration for a number of years within the context of the GATT and the WTO. Currently, the WTO's Committee on Trade and Environment (CTE) is

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29/ United Nations General Assembly resolution 49/52 of 9 December 1994, operative paragraph 3.

30/ Document UNEP (OCA)/LBA/IG.2/7, 5 December 1995.

31/ Document UNEP (OCA)/LBA/IG.2/6, 5 December 1995, pages 16-19.

32/ This includes the work of the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), which includes UNEP, ILO, FAO, WHO, UNIDO, and OECD; the preparation of the International Programme on Chemical Safety (IPCS) report on twelve short-listed POPs; and the Intergovernmental Forum on Chemical Safety (IFCS) Intersessional Group Meeting including its Expert Meeting on POPs, held in Manila, Philippines, 17-23 June 1996 on international action.

seized of the matter. The CTE will prepare a report to the first biennial meeting of the WTO Ministerial Conference scheduled to be held in Singapore in December 1996. Detailed proposals have been submitted to the CTE by Japan, New Zealand and the European Community. There is no comparable work being done by intergovernmental bodies whose mandate is chiefly in the field of environmental protection and sustainable development.

(v) Public participation in environmental decision-making processes

Work on a draft convention on public participation in environmental decision-making is currently in progress within the U.N. Economic Commission for Europe (ECE). This would be, by its nature, a regional instrument. It could, however, provide a valuable model for efforts to respond to Principle 10 of the Rio Declaration on a more general level.

3. Recommended Action

In light of the foregoing analysis, and taking into account work that is currently underway in the relevant international fora, it is recommended that competent international bodies, such as UNEP, take action in the following areas. 33/ Certain of these areas are included because of their importance, even though a new instrument is not recommended at this time, because the need for and feasibility of related new instruments should be further explored.

(a) Marine pollution from land-based activities: Where appropriate, elaborate and conclude regional protocols to implement the Global Programme of Action of 5 December 1995. 34/

(b) Protection, allocation and management of shared fresh water resources: Elaborate and conclude agreements or protocols concerning specific regions or international drainage basins. 35/

33/ These recommendations are not listed in any order of priority.

34/ See the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, document UNEP (OCA)/LBA/IG.2/7, 5 December 1995; and the Washington Declaration on Protection of the Marine Environment from Land-Based Activities, adopted on 1 November 1995 at the High-level Segment of the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities; document UNEP (OCA)/LBA/IG.2/6, 5 December 1995, Annex II, pages 16-19. The Global Programme of Action contemplates, *inter alia*, the development of an instrument covering persistent organic pollutants (POPs).

35/ In elaborating these agreements or protocols, states may wish to take into consideration, *inter alia*, the framework agreement to be negotiated by a Working Group of the Whole of the Sixth Committee of the United Nations General Assembly, beginning 7 October 1996, on the basis of the draft articles on the law of the non-navigational uses of international watercourses prepared by the International Law Commission.

(c) Regulation of hazardous substances and chemicals: Elaborate and conclude a global legally binding instrument on persistent organic pollutants (POPs), as recommended by the Intergovernmental Forum on Chemical Safety (IFCS), and on prior informed consent (PIC).

(d) Climate change: Monitor efforts, in particular those being made through the appropriate legal instruments, to address climate change and help to ensure that the process continues forward in an expeditious and scientifically sound manner.

(e) Interaction of International Environmental Law with other branches of International Law: Strengthen cooperation between concerned bodies to ensure that environmental considerations, as well as agreements in the field of the environment and sustainable development, are taken fully into account in the development and application of other branches of law, in particular WTO law and regional agreements on trade and investment.

(f) Enhancing public participation in environmental decision-making processes: Undertake efforts to elaborate internationally applicable principles relating to public participation in environmental decision-making processes and to promote the incorporation of these principles into national laws, as appropriate.

(g) Enhancing cooperation at the local level on transboundary problems: Promote the development of cooperative relationships between and among regional and local authorities of neighbouring countries, and, where appropriate, the conclusion of regional agreements on the subject.

(h) Forest loss and management: Promote the elaboration and conclusion of regional agreements on the protection and management of forests, in the light of the Statement of Forest Principles.

(i) Further development of concepts and principles in the field of International Environmental Law and Sustainable Development: Continue work on the clarification and further development of concepts and principles in the field of environmental protection aiming at sustainable development, whether in meetings dedicated to this end or in the context of work on general problems or sectoral issues in the field of the environment and sustainable development. The achievement of a common understanding and interpretation of concepts and principles in this field should be promoted. Further consideration should be given to the importance of these concepts and principles for the elaboration of global and regional instruments in the field.

ANNEX A

Background

In 1982 the Governing Council of the United Nations Environment Programme (UNEP) adopted the Montevideo Programme for the Development and Periodic Review of Environmental Law. 36/ The Montevideo Programme has guided UNEP in the further development of environmental law, in particular through international legal instruments in the field of the environment.

On 21 May 1993 the UNEP Governing Council by its decision 17/25 adopted the Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II) as a broad strategy for the activities of UNEP in the field of environmental law for that decade. In that decision the Council also emphasized the role of UNEP "in the continued progressive development of international environmental law as a means for achieving wider adherence to and more efficient implementation of international environmental conventions, and for future negotiating process for legal instruments in the field of sustainable development, in accordance with paragraph 39.1(a) of Agenda 21."

In the context of the mid-term review of the Montevideo Programme II, the Governing Council on 26 May 1995 adopted decision 18/9. In paragraph 5 of that Decision, set forth in the Introduction to the present Study, the Governing Council requested the Executive Director to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development. The present study responds to that request.

36/ UNEP Governing Council decision 10/21 of 31 May 1982.

ANNEX B

Other Important Challenges in the Field of Environmental Protection and Sustainable Development

A. Challenges

1. Liability and compensation in the field of transboundary movements of hazardous wastes (Article 12 of the Basel Convention envisages elaboration of a liability protocol) 37/

2. Loss of biodiversity (issues remaining to be addressed include biosafety (a Working Group to develop a protocol on this subject was recently established), liability for damage to biodiversity, the relationship between intellectual property protection and the sustainable development objectives of the Convention, and the Convention's trade-related provisions)

3. Protection of the environment in times of armed conflict (the existing legal regime is fragmented; it needs to be made more coherent)

4. Threats to environmentally sensitive areas (mountains, wetlands, etc.)

5. Urbanization and population growth, problems of human settlements, including their growth, demographics, unsustainable production and consumption patterns

6. Transboundary air pollution (continue efforts to share the experience with the 1979 Geneva Convention on Long-Range Transboundary Air Pollution and its protocols with other regions of the world, and to develop of international legal instruments and mechanisms in those regions, as appropriate)

7. Emergency avoidance, preparedness and response (on the global level)

8. Protection of the environment in the global commons/areas beyond the limits of national jurisdiction

9. Biosafety: control of the introduction of alien species and of genetically modified organisms

10. Localized but recurring air pollution problems, especially in urban settings

11. Environmental damage caused by military activities outside of war.

37/ Cf. the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, adopted on 3 May 1996 by the International Conference on Hazardous and Noxious Substances and Limitation of Liability convened by the International Maritime Organization in London from 15 April-3 May 1996.

B. Challenges listed under A, above, that are being or have recently been addressed in various international fora

1. Liability and compensation in the field of transboundary movements of hazardous wastes (the Conference of the Parties to the Basel Convention has established an ad hoc working group of legal and technical experts to consider and develop a draft protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal; its fourth session met in Geneva in June 1996).

2. Biosafety: control of the introduction of alien species and genetically modified organisms (the Conference of the Parties to the Convention on Biological Diversity has decided to hold negotiations on this subject).